Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-788

JOSEPH DIANA, et al.,

Petitioners,

—against—

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RONALD P. FISCHETTI
1290 Avenue of the Americas
New York, New York 10019
212/586-3732

Counsel for Petitioners

ANNE C. FEIGUS

Of Counsel

November 21st, 1979

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Petitioners Joseph Diana, Billy Joe Robertson, Maurice Leon Jones, Robert Wade Jenkins, Thomas Stabile, Wayne Thomas Huey, John Pellegrino, Michael Elton Burnham, Ralph Frank Volino, Michael Ervin Catoe, Robert Lewis Melton and David Donnell White, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in this proceeding on August 29th, 1979.

Opinions Below

The opinion of the Court of Appeals, not yet reported, appears in the appendix hereto at page 1a. The written order, rendered by the District Court for the District of South Carolina, denying petitioners' pre-trial motion to suppress appears in the appendix hereto at page 27a.

Jurisdiction

The judgment of the Court of Appeals for the Fourth Circuit was entered on August 29th, 1979. A timely petition for rehearing and suggestion for rehearing *in banc* was denied on October 23rd, 1979 and this petition for certiorari was filed within thirty days of that date. This Court's jurisdiction is invoked under 18 U.S.C. §1254(1).

Questions Presented

1. Whether the government's failure to obtain the "immediate" judicial sealing of its wiretap evidence, as mandated by 18 U.S.C. §2518(8)(a), coupled with the absence of a satisfactory explanation for the thirty-nine-day delay involved herein, rendered that evidence inadmissible?

2. Whether the failure of the court, who possessed personal knowledge of disputed evidentiary facts and was a necessary witness who refused to testify at the suppression hearing, to recuse itself deprived petitioners of their rights to due process of law and to confront the witnesses against them?

Statutory Provisions Involved

Title 18, United States Code, Section 2515, states as follows:

> "Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other

> authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter."

Title 18, United States Code, Section 2518(8)(a) states as follows:

> "§2518. Procedure for interception of wire or oral communications.
>
> (8)(a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such a way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517."

Title 18, United States Code, Section 2518(10)(a) states as follows:

(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice."

Title 28, United States Code, Section 455, states as follows:

"§ 455. Disqualification of justice, judge, magistrate, or referee in bankruptcy.

(a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of the party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) 'proceeding' includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) 'fiduciary' includes such relationships as executor, administrator, trustee, and guardian;

(4) 'financial interest' means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a 'financial interest' in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a 'financial interest' in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a 'financial interest' in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a 'financial interest' in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, magistrate, or referee in bankruptcy shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification."

Statement of the Case

The indictment in the case at bar charged petitioners, among others, with a far-flung interstate conspiracy to unlawfully transport and distribute stolen automobile engines and parts. At trial, the government introduced extensive evidence obtained through electronic surveillance. Petitioners' pre-trial motion to suppress this evidence upon the grounds that the government had failed to seal the tape recordings of the conversations in accordance with 18 U.S.C. §2518(8)(a) was denied by the district court. The facts pertinent to the issues raised herein may be briefly summarized as follows.

On March 22nd, 1977, government agents obtained court authorization to conduct electronic surveillance in the Lancaster, South Carolina area. Five interceptions were set up to make two simultaneous recordings. Although both recordings were identical, one was labeled an original and the other a duplicate original. (A 176-177, 189)* One agent was specially designated to maintain control custody of the tapes. (A 225) He testified at the pre-trial suppression hearing that at the end of each day, he placed the original tapes in individual envelopes which he sealed and initialed. He thereupon placed the envelopes in a locked cabinet located in the apartment where the monitoring took place. (A 177-178, 224-226) Upon the termination of the surveillance on April 11th, 1977, the original tapes and the duplicate originals were transported to the F.B.I. office in Rock Hill, South Carolina. (A 229, 236)

On April 13th, 1977, the United States Attorney instructed the agent in charge of the tapes to place the originals in five sealed boxes and to keep them in the F.B.I. office until further notice. (A 229, 236, 238-239) The five boxes remained on the floor of this agent's office, behind his desk, until May 20th, 1977 when, pursuant to further instructions from the United States Attorney, they were delivered to the United States Marshal in Columbia, South Carolina for sealing. (A 230, 240)

No formal judicial sealing order existed in the case at bar. (A 291) At the suppression hearing, the United States Attorney acknowledged, however, that a written sealing order had been employed on previous occasions. (A 292-293) The oral order herein was purportedly the result of a telephonic communication between the court and the

* The letter "A" refers to petitioners' appendix filed in the Fourth Circuit Court of Appeals.

United States Attorney. (A 296) The only evidence of this oral order was the testimony of the United States Attorney at the suppression hearing. In response to defense counsel's inquiry, he stated that no corroborative documentation in the form of notes, memoranda, diary entries, telephone receipts, expense vouchers or the like, existed. (A 300-302, 307-308) Consequently, he could assign no date whatsoever to the telephone communication.

Defense counsel was advised at the pre-trial proceeding on September 7th, 1977 that the court itself could have been a party to the oral order. (A 136-138) Counsel thereupon informed the court that if it had in fact been a participant, he would move for the court's recusal pursuant to 28 U.S.C. §455. (A 135) Receiving confirmation of this fact, counsel, at the outset of the suppression hearing on September 22nd, 1977, duly demanded that the court recuse itself for purposes of the hearing only. (A 161-163) The court denied this motion. (A161-163) Upon the conclusion of the testimony of the United States Attorney, defense counsel attempted to call the court as a necessary witness while preserving its recusal motion. (A 331) Refusing to testify, the court then made a statement on the record setting forth its recollection of the oral order. It likewise could not assign a precise date. (A 333-336) Defense counsel took an exception to the court's statement. (A 337)

REASONS FOR GRANTING THE WRIT

I.

The Decision Below Conflicts With the Decision of the Second Circuit Court of Appeals as to the Proper Interpretation of 18 U.S.C. §2518(8)(a) and 18 U.S.C. §2518(10)(a).

On August 29th, 1979, a panel of the Fourth Circuit, in a two-to-one decision, affirmed petitioners' convictions under 18 U.S.C. §371. Certiorari is respectfully sought herein to consider a complex issue within the controversial realm of electronic eavesdropping. Various circuits have struggled unsuccessfully to define the interplay between 18 U.S.C. §2518(8)(a), the express sealing provision of Title III, and 18 U.S.C. §§2515 and 2518(10)(a), the general exclusionary provisions of Title III.

This Court has not yet examined the precise nature of the role played by 18 U.S.C. §2518(8)(a). It is respectfully submitted that the confusion which exists among the lower courts in this regard requires the type of analysis which this Court has performed in connection with other provisions of 18 U.S.C. §2510 *et seq.* See, e.g., *United States* v. *Donovan,* 429 U.S. 413 (1977) (18 U.S.C. §2518[1][b][4] and §2518[8][d]); *United States* v. *Chavez,* 416 U.S. 562 (1974) (18 U.S.C. §2516[1]); *United States* v. *Giordano,* 416 U.S. 505 (1974) (18 U.S.C. §2516[1]).

Petitioners urge this Court to apply the guidelines set out in *Donovan, Chavez* and *Giordano, supra,* to determine once and for all whether the express sealing provision is in fact an "integral part" of the statutory scheme. The Second Circuit has adopted this position. *United States* v. *Gigante,* 538 F.2d 502 (2d Cir. 1976); *United States* v.

Vazquez, —— F.2d —— (2d Cir. 8/24/79), sl.op. 4333. In short, the Second Circuit has held that where tapes have not been properly sealed in accordance with §2518(8)(a), suppression is appropriate even in the absence of any showing that the tapes have been altered. The court reasoned that to predicate suppression of improperly sealed tapes upon a showing of tampering would controvert the literal language of the statute and would vitiate the congressional purpose.

Other circuits, among them the Third, Fifth, Seventh and now the majority of the Fourth Circuit in the case at bar, have apparently rejected this rule. These courts, in spite of complete non-compliance with §2518(8)(a), have refused to enforce the suppression sanction absent proof by the defendants of actual tampering. The Second Circuit has deemed this burden of proof to be an extraordinarily difficult, albeit impossible one, in light of the unique susceptibility of tape recorded evidence to manipulation and alteration. In addition, unlike the Second Circuit, these courts have relied upon the general suppression provision, §2518(10)(a), rather than the express sealing provision, §2518(8)(a). See, e.g., *United States* v. *Falcone,* 505 F.2d 478 (3rd Cir. 1974), *cert. denied* 95 S.Ct. 1338 (1975); *United States* v. *Sklaroff,* 506 F.2d 837 (5th Cir. 1975); *United States* v. *Cohen,* 530 F.2d 43 (5th Cir. 1976), *cert. denied* 429 U.S. 855 (1977); *United States* v. *Lawson,* 545 F.2d 557 (7th Cir. 1975).

Petitioners assert that congressional recognition of the overriding importance of the sealing requirement and the safeguards which it represents is manifested by the fact that the severe sanction of inadmissibility was incorporated within the body of §2518(8)(a). This is compelling evidence that Congress intended for the courts to resolve sealing issues within the four corners of that statute alone. It

should be noted that petitioners' position has been strongly endorsed by the dissenting member of the Fourth Circuit panel. Judge Hall stated that where tapes have not been immediately sealed and the government cannot provide a satisfactory explanation for its non-compliance, the evidence must be suppressed under the independent aegis of §2518(8)(a) without reference to §2518(10)(a).

It is respectfully submitted that this conflict justifies the grant of certiorari to review the judgment below.

II.

The Correctness of the Decision Below Is Open to Serious Question.

Petitioners contend that the majority of the Fourth Circuit panel erred when it held that the government had established a "satisfactory explanation" within the meaning of §2518(8)(a) for the thirty-nine-day sealing delay in the case at bar. Petitioners assert on the contrary, as did the dissenting member of the panel, that the government's "purported explanation," which emerged from the testimony given at the pre-trial suppression hearing, simply cannot withstand logical scrutiny.

Of critical importance is the uncontroverted fact that each interception during the period of surveillance was set up to make two simultaneous recordings. One of these was designated an original and the other a duplicate original. The government alleged that retention of the original tapes for the thirty-nine days was necessitated by the possibility that some of the duplicates might have malfunctioned and would, therefore, have been useless in the preparation of search warrants and the like. Yet, in fact the agents never once referred to the original tapes during that period for

any purpose whatsoever. Furthermore, the originals and duplicate originals had been compared for accuracy and audibility within a few days of expiration of the original order. Nevertheless, the sealed original tapes contained in sealed boxes remained on the floor of a government agent's office for more than another month before sealing took place in conformity with §2518(8)(a).

Thus, the dissent found the government's argument to be "fatally undercut" by the uncontradicted testimony elicited at the suppression hearing. Petitioners respectfully urge this Court to establish criteria for the guidance of lower courts in determining whether an explanation for late sealing offered by the government is acceptable or unacceptable. If lower courts are permitted to deem any explanation, no matter how spurious, to be a satisfactory one, §2518(8)(a) will become a meaningless nullity. Consequently, the consideration of this Court is necessary as well to elucidate this aspect of §2518(8)(a), in addition to its proper role within the larger framework of Title III.

Finally, petitioners contend that the court below erred in upholding the district court's refusal to recuse itself for purposes of the suppression hearing. The sealing order in the case at bar was purportedly the result of a telephone conversation between the United States Attorney and the district court. Despite the fact that written sealing orders had been previously employed, defense counsel was confronted with a situation where the only witnesses to this critical evidentiary issue were the United States Attorney and the Presiding Judge, since there was no other evidence regarding the precise date of the oral order. It is respectfully urged that under the circumstances herein, the court could not fairly evaluate the credibility and recollection of the United States Attorney. This duty could not have been performed without improper reliance upon the court's own

recollection. Moreover, by refusing to testify, the court denied counsel complete access to the only other source of information regarding the sealing order. Rather, the court volunteered its own well-intentioned, but hazy remembrance of this event. Accordingly, the court's conduct precluded the petitioners from receiving a full and fair hearing upon the suppression issue.

In summary, petitioners respectfully submit that the sealing issue raised herein is one of exceptional importance. This controversial area of the law remains shrouded in confusion and controversy. Only this Court can resolve the serious disagreement which exists among the lower courts. Consideration of this Court is, it is suggested, essential in order to impose much-needed logic upon the law in this area and to preserve the fundamental constitutional safeguards embodied in the panoply of statutes and procedures governing electronic surveillance.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit Court of Appeals.

Respectfully submitted,

RONALD P. FISCHETTI
Counsel for Petitioner

ANNE C. FEIGUS
Of Counsel

November 21st, 1979

APPENDIX

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 78-5053

UNITED STATES OF AMERICA,

Appellee,

v.

JOSEPH DIANA, BILLY JOE ROBERTSON, MAURICE LEON JONES, ROBERT WADE JENKINS, THOMAS STABILE, WAYNE THOMAS HUEY, JOHN PELLIGRINO, MICHAEL ELTON BURNHAM, RALPH FRANK VOLINO, MICHAEL ERVIN CATOE, ROBERT MELTON, DAVID DONNELL WHITE,

Appellants,

and

ANTHONY MILIA, et al.,

Defendants.

No. 78-5054

UNITED STATES OF AMERICA,

Appellee,

v.

DAVID DONNELL WHITE,

Appellant.

Appeals from the United States District Court for the District of South Carolina, at Rock Hill. J. Robert Martin, Jr., District Judge.

Argued January 12, 1979 Decided August 29, 1979

Opinion of Court of Appeals

Before:

FIELD, *Senior Circuit Judge,*
WIDENER and HALL, *Circuit Judges.*

Ronald P. Fischetti (Fischetti & Shargel on brief), *for Appellants;* Thomas P. Simpson, Assistant United States Attorney (Thomas E. Lydon, Jr., United States Attorney, on brief), *for Appellee.*

WIDENER, *Circuit Judge:*

The appellants were convicted under 18 U.S.C. § 371 for conspiring to transport and distribute stolen automobile engines and parts. The indictment charged 25 defendants with one count of conspiracy and numerous substantive offenses. All the substantive counts were dismissed before the case went to the jury. With respect to the conspiracy count, the charges against 3 defendants were so dismissed. Of the remaining 22 defendants, the jury acquitted 10 defendants and convicted 12 defendants who are the appellants in these cases.

The basic theory of the government's case was that the defendants participated in a conspiracy in which defendants in New York supplied stolen auto parts to salvage dealers in North and South Carolina. The conspiracy involved four groups: the New York suppliers, the transporters, the principal receivers who stored the property and transferred it to the ultimate receivers. None of this last group were convicted. Trial of the case lasted two and one-half months, and was remarkably error free as shown by the fact that the defendants raise only three issues on appeal. We find the assignments of error to be without merit and affirm the convictions.

Opinion of Court of Appeals

I

Defendants' first argument is based on what is claimed to be a fatal variance between the allegations in the indictment and the proof of trial. The essence of the argument is that the indictment alleged one overall conspiracy, but the proof at trial showed many separate conspiracies. Thus, so the argument goes, the individual conspiracies should have been tried separately, and the failure to do so prejudiced the defendants' right to a fair trial and requires reversal of their convictions under the authority of *Kotteakos* v. *United States,* 328 U.S. 750 (1946).

The crux of the appellants' position is that the ultimate receivers were joined improperly with the other three groups of defendants since the ultimate receivers were not aware of or a part of the overall conspiracy. In support of their position, appellants point to the fact that all the ultimate receivers were acquitted. This, they say, is proof certain that the overall conspiracy charged in the indictment did not exist. Having thus found the non-existence of the overall conspiracy charged, the defendants then call upon the rule in *Kotteakos* to demonstrate that they should not have been tried and that their convictions ought to be reversed on that account. They also argue that they were prejudiced because the decision to join the ultimate receivers made the trial unnecessarily lengthy and complex. The latter argument essentially is that the government should not be allowed to bring in an additional group of defendants in order to complicate an already complicated trial.

While we feel that the argument of spillover prejudice is speculative at best, for the risk exists in each case of prosecution of multiple defendants, we need not base our

decision on that conclusion, for we hold that the substance of appellants' argument is without merit. As noted above, appellants' rely on *Kotteakos*. We feel that they read that case too broadly. The jury in *Kotteakos*, after being instructed on the single conspiracy theory which was alleged in the indictment, found eight defendants guilty of conspiring to defraud the government. Most of the defendants had no connection with each other except their separate and independent use of the defendant Brown to secure fraudulent government loans. Tht Supreme Court reversed all the convictions and held that the jury could not possibly have found, on the evidence in the record, that there was only a single conspiracy. The government had admitted as much when it described the case as " . . . separate spokes meeting in a common center," although, as the Court noted, "without the rim of the wheel to enclose the spokes." 328 U.S. at 755.

The facts of *Kotteakos* are far different from the case at bar. Here, there was evidence from which a jury could have found a single four-link conspiracy. Although such proof proved in vain when the jury acquitted the ultimate receivers, there was evidence on which a finding of a single four-part conspiracy might have been based, and it was not error here, as it was in *Kotteakos*, for the judge to instruct the jury. Furthermore, the mere fact that the ultimate receivers were acquitted does not show that this was a case of many separate conspiracies—rather, it simply shows no more than that the jury thought the ultimate receivers were not guilty under the instructions of the court. The general verdict says nothing about the proof of a single three or four-part conspiracy, but of course goes only to the ultimate question of guilty or not guilty.

In sum, there was evidence to show a single four-link conspiracy even though the jury did not convict the members of the fourth link in the chain.[1] Thus, there is no error in indicting and trying the ultimate receivers of the stolen property. The government need not win its case against all defendants in a conspiracy case in order to avoid a charge of variance. To hold otherwise would be to invite a finding of a fatal variance between indictment and proof whenever one discrete group of defendants is acquitted in a conspiracy case.

II

The next assignment of error requires close attention. In proving its case, the government relied on evidence obtained through electronic surveillance of telephonic and oral conversations. The defendants moved to suppress this evidence on the ground that the government failed to seal the tape recordings of the conversations in the manner required by Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 et seq. Specifically, §2518(8)(a) states:

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[1] For only one example, there was evidence that one Mahaffey repeatedly purchased stolen engines from those convicted which were delivered to him from New York by one or more of the transporters. Some of the engines Mahaffey purchased had not been removed from their chassis by tools, rather by cutting hoses, wires, motor mounts, transmission mounts, and even drive shafts, from which the inference might have been drawn that Mahaffey knew he was dealing with thieves and their confederates. A delivery of stolen engines to Mahaffey in his absence was made to one Burnham, a local distributor, who was convicted. The price for that load was $450 for eleven engines. There was also evidence that many of the engines delivered by Robertson or his employees had their engine motor numbers ground off.

"The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recording shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings, shall be whenever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517."

The essential facts concerning the sealing of the tapes may be stated briefly. The electronic surveillance of telephone conversations was conducted between March 22, 1977 and April 11, 1977 pursuant to court authorization. Each of five machines was set up to make two simultaneous recordings, one labeled "original" and one "duplicate original." Two logs, an original and a carbon copy, were kept. At the end of each day of surveillance, the original tapes were placed in envelopes which were sealed and initialed by the F.B.I. agent in charge. Upon the termination of the

surveillance on April 11, the original and duplicate original tapes were transported to the F.B.I. office in Rock Hill, South Carolina. On April 13 the United States Attorney instructed the agent in charge of the tapes to place the originals in sealed boxes and to keep them in the F.B.I. office until further notice. On May 20, pursuant to further instructions from the United States Attorney, who was directed by the district court, the tapes were delivered to the United States Marshal in Columbia, South Carolina for formal sealing.

The first question raised is precisely when the tapes were sealed within the meaning of the statute. The district judge, who also presided at trial of this case, gave an oral sealing order to the United States Attorney.[2] Neither the court nor the United States Attorney kept any written record of the order or of the date on which the order was given. The United States Attorney testified at the suppression hearing that he had telephoned the district judge and received the order some time between April 11 and May 20; he was unable to assign the date with any more specificity. The district judge stated that he had in fact given the order by telephone, probably between April 25 and May 20, since he had been unavailable prior to April 25 for reasons of health. Both the district judge and the United States Attorney stated that the order had directed the tapes to be delivered to the United States Marshal for formal sealing, and such delivery in fact took place on May 20. At oral argument the government argued that

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[2] We attach no significance to the fact that the order was given orally, although the record reflects that the district judge's past practice (better, as the district court acknowledged) had been to issue such orders in writing. See *United States* v. *Gigante*, 538 F2d 502, 407 (2d Cir. 1976).

the actual sealing must have occurred on April 13, but there is no need for us to decide the exact date because, for purposes of this appeal, we give the defendants the benefit of any doubt and assume that the order to seal the tapes as required by the statute was given on May 20, a 39 day delay.

Thus, we also assume that the tapes were not sealed "immediately." The issue which remains, then, is whether the government has provided "a satisfactory explanation" for such failure. That question is one of first impression in this circuit.

In interpreting the "satisfactory explanation" provision, we must first place it in context with other provisions of Title III. Section 2515 imposes exclusionary sanctions to compel compliance with prohibitions of the chapter. It states:

> "Whenever any wire or oral communication has been intercepted, no part of the contents of such may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter."

Section 2515 should be read in conjunction with § 2518 (10)(a) which spells out the grounds on which wiretap evidence may be suppressed, and those who may make the motion. See 1968 U.S. Code Cong. & Admin. News at 2184-85, Senate Report No. 1097. Subsection (10)(a)* in pertinent part is:

* § (10)(a) was amended later in 1978, after these convictions, in particular not pertinent here. P. L. 95-511, October 25, 1978.

> "Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—
>
> (i) the communication was unlawfully intercepted;
>
> (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
>
> (iii) the interception was not made in conformity with the order of authorization or approval."

The section we are immediately concerned with, § 2518 (8)(a), and the only one under which the defendants claim, as previously noted, has its own independent exclusionary provision for the omission of sealing, as well as its own exception to that provision, so the exclusionary provisions of §§ 2515 and 2518(10)(a) need not necessarily control.

The Supreme Court has made it clear that not every violation of the statute requires suppression of the wiretap evidence. *United States* v. *Donovan,* 429 U.S. 413 (1977); *United States* v. *Chavez,* 416 U.S. 562, 574-75 (1974). *Chavez dealt with* 18 U.S.C. § 2516(1) which requires that the official authorizing the wiretap be identified and provides that the wiretap may be approved by the Attorney General or a specially designated Assistant Attorney General. In *Chavez,* a wiretap on one Fernandez was excluded for improper authorization; however, the *Chavez* wiretap, which misidentified the authorizing officer, but in fact had been properly authorized, was admitted

into evidence. *Donovan* concerned 18 U.S.C. § 2518(1)(b)(iv) which requires the government to identify, in its application for a wiretap, the person whose communication is to be intercepted, and § 2518(8)(d) which requires, in part, the issuing judge to give notice to the persons whose communications were intercepted. Donovan and two others had received proper notice under (8)(d), but were not named in the applications as required by (1)(b)(iv). Two other defendants were inadvertently not listed in the notice documents and thus were not given proper notice. Despite these violations, the Court refused to suppress the evidence for either violation, holding that neither provision played a central role in the overall purpose of Title III.

Based on *Chavez* and its companion case, *United States* v. *Giordano,* 416 U.S. 505 (1974), the Ninth Circuit has developed the following three-part test to determine if wiretap evidence obtained in violation of the statute should nevertheless be admitted at trial:

> "In resolving this issue [whether post-interception violations of Title III fall within (10)(a)(i)] *Chavez* and *Giordano* suggest that there are several important factors which should be considered. As an initial matter, it must be determined whether the particular procedure is a central or functional safeguard in Title III's scheme to prevent abuses. . . . If this test has been met, it must also be determined whether the purpose which the particular procedure was designed to accomplish has been satisfied in spite of the error. . . . While in most situations it would not be necessary to reach beyond the above-mentioned factors, it may be that in some instances they will not be completely determinative. In such cases, *Chavez* implicitly suggests a third factor which may have a bearing on the issues—i.e. whether the statutory requirement was deliberately ignored; and, if so, whether there was any tactical advantage to be gained thereby."

United States v. *Chun,* 503 F.2d 533, 542 (9th Cir. 1975).

While the Supreme Court has not spoken to the relationship between (10)(a) and (8)(a), as discussed above, the Court has held that not every violation of Title III requires exclusion of the evidence obtained in violation of the statute. A court should determine the purpose of the provision in question and must determine if the requirement is central to the overall Congressional scheme. Section 2518(8)(a) contains its own provision for exclusion, but also has its own exception for a satisfactory explanation. We feel a relevant inquiry is the effect, if any, the Supreme Court's interpretation of (10)(a) in *Chavez* and *Donovan* has on the scope of the "satisfactory explanation" exception. We also feel that a consideration of (10)(a) and the *Chun* test, especially in the determination of the purpose of (8)(a), would be relevant in determining whether or not a satisfactory explanation was provided. If the inquiry into the proffered explanation reveals that the purpose of the statute was carried out, then this fact would have at least some bearing on whether the explanation was satisfactory. The Third, Fifth and Seventh Circuits all have gone at least this far. *United States* v. *Falcone,* 505 F2d 478 (3d Cir. 1974), cert. den. 420 U.S. 955 (1975); *United States* v. *Diadone,* 558 F2d 775 (5th Cir. 1977); *United States* v. *Lawson,* 545 F2d 557 (7th Cir. 1975). Thus, we feel that *Chavez, Donovan* and *Chun* are persuasive in (8)(a) cases.

Turning more directly to the scope of the satisfactory explanation provision, we note that four circuits have

dealt with sealing delays which violated § 2518(8)(a). In *Falcone,* supra, the (8)(a) violation was admitted, but the Third Circuit held that the evidence should not be suppressed because the trial court had found, after an extensive hearing, that no one had tampered with the tapes.[3] The court expressed its holding as follows: "Therefore, all we hold is that where the trial court has found that the integrity of the tapes is pure, a delay in sealing the tapes is not, in and of itself, sufficient reasons to suppress evidence obtained therefrom." 505 F2d at 484.

The Seventh Circuit has twice dealt with this issue. In *Lawson,* supra, the court analyzed this question exclusively under (10)(a)(i) and held that since the purpose of the sealing requirement (the integrity of the tapes) was not challenged, the wiretap evidence should not be suppressed despite a virtually unexplained delay of 57 days. More recently, the Seventh Circuit expanded on the *Lawson* approach in *United States* v. *Angelini,* 565 F2d 469 (7th Cir. 1977). In *Angelini* the court adopted a two-step approach. The first inquiry is whether a satisfactory explanation is given. If there is, the evidence is admissible. If not, then (10)(a) and the three-part *Chun* test, discussed above, are applied. Thus, in the Seventh Circuit either a satisfactory explanation or compliance with *Chun* is sufficient, in and of itself, to allow the wiretap evidence to be admitted despite a violation of the sealing requirement.

The Fifth Circuit also has refused to suppress evidence for (8)(a) violations. *United States* v. *Diadone,* 558 F2d 775, 780 (5th Cir. 1977); *United States* v. *Sklaroff,* 506

[3] The court did mention the satisfactory explanation provision and gave as an example that police confusion had constituted a satisfactory explanation in another case. However, it did not hold that a satisfactory explanation was given in the case before it.

F2d 837 (5th Cir. 1975), cert. den., 423 U.S. 874 (1975). In each case, a central rationale for decision was the fact that the integrity of the tapes was not challenged. Additionally, in *Sklaroff* the government explained the 14 day delay by stating that the tapes remained in the F.B.I. evidence room for 7 days and that the other 7 days were used in the preparation of search warrants. The court held there was a substantial compliance with the statute. In *Diadone,* no explanation was discussed by the court; the admitted integrity of the tapes was sufficient to allow their admission into evidence.

The Second Circuit has had several cases on this subject. In *United States* v. *Poeta,* 455 F2d 117 (2d Cir. 1972), cert. den., 406 U.S. 948 (1972), the government delayed for 13 days in obtaining the required seal. By way of explanation, the government stated that it thought only the "issuing justice" (under a New York statute) could order the sealing and that he was on vacation when the wiretap was terminated. The court held that this explanation was satisfactory where no evidence of tampering was presented.

Four years later, the Second Circuit examined the subject again in *United States* v. *Gigante,* 538 F2d 502 (2d Cir. 1976). In *Gigante,* the court excluded wiretap evidence due to an (8)(a) violation, but the case should be read in the light of its admitted facts that the government conceded that no satisfactory explanation was available, the delays in sealing ranged from 8 months and 12 days to 12 months and 25 days, and there were numerous irregularities in the storage process. *Poeta* was cited with approval in *Gigante* and distinguished on the ground that the government in *Gigante* conceded that no explanation for the delay could be given. Furthermore, the *Gigante*

opinion remanded the case with respect to another set of tapes to see if the government could explain delays of 6 and 37 days.

However, the discussion in *Gigante* indicates that the Second Circuit has adopted a more strict approach than that used in the Third, Fifth and Seventh Circuit cases discussed above. The court stated that the defendant should not have to prove tampering as a prerequisite to suppression of evidence. Thus, *Gigante* may imply that a lack of tampering, in and of itself, will not be a satisfactory explanation, and will not satisfy the *Chun* test.

More recently, and subsequent to *Gigante,* the Second Circuit affirmed without opinion a district court decision which found a satisfactory explanation for 24 and 42 day delays. *United States* v. *Caruso,* 415 F.Supp. 847, 850-51 (S.D. N.Y. 1976), aff'd without opinion, 553 F2d 94 (2d Cir. 1977). With respect to the 42 day delay, the district court gave only the bare conclusion that based on all the evidence a satisfactory explanation was given. On the 24 day delay, the court accepted the government's explanation that there was confusion in the district attorney's office because the wiretap was terminated prior to the date to which it originally had been authorized and that the assistant district attorney in charge of the case had been hospitalized. 415 F.Supp. at 850.

We think a summary of the Second Circuit cases indicates that *Gigante* has not significantly restricted the admission of evidence under § (8)(a) except perhaps to the extent that a lack of evidence of tampering, in and of itself, will not be enough to allow the admission of wiretap evidence where an (8)(a) violation has occurred.[4] Three other

[4] *United States* v. *Ricco,* 421 F.Supp. 401 (S.D. N.Y. 1976), aff'd on other grounds, 566 F2 433 (2d Cir. 1977), was decided under

circuits have rejected the Second Circuit's approach and have held that a lack of any evidence of tampering goes either all the way, *Diadone,* supra, or a long way, *Angelini,* supra, *Falcone,* supra, toward overcoming an (8)(a) violation.

We agree with the Third, Fifth and Seventh Circuits that the purpose of the sealing requirement is to insure the integrity of the tapes. We further hold that an inquiry into this subject is appropriate in determining whether a satisfactory explanation has been provided. Since we find, however, a satisfactory explanation in this case based in part on considerations other than the fact that the integrity of the tapes is not challenged, we need not decide if we would allow the evidence to be admitted solely on the basis of the fact that no tampering has been shown.[5]

With this background in mind, we turn to the government's explanation in this case. We note that a finding of a satisfactory explanation is largely based on factual determinations which will not be reversed unless clearly erroneous. *Campbell* v. *United States,* 373 U.S. 487 (1963); *United States* v. *Woodward,* 546 F.2d 576 (4th Cir. 1976).

After hearing testimony on the question, the district judge held that the government had given a satisfactory explanation for the delay. He found:

> "Here, a reasonable explanation for the delay has been offered by the government in that the original tapes were necessary in the event that the duplicate tapes

New York law. Where the integrity of the tapes was in question, that case found an unsatisfactory explanation for a delay in sealing.

[5] The defendants have made no effort to attack the integrity of the tapes. They take the position that such a task is unfeasible and Herculean. Their basic argument, distilled, is that they claim the fact is irrelevant.

could not mechanically provide the needed information in preparing warrants, indictment and transcripts from April 11, 1977 to May 20, 1977. Since duplicate tapes had malfunctioned in the past, there was no reason for the government to believe it could not happen again. The mere fact that agents have listened to the duplicate tapes during the course of the electronic surveillance would have nothing to do with a possible malfunction during the time warrants, indictment and transcripts were being prepared. Additionally, there was over 2000 hours of recorded communications intercepted and it is obvious that more detailed inspection of the tapes became necessary during the time of warrant, transcript and indictment preparation."

We do not feel that the district court's fact finding was clearly erroneous or that its legal conclusion that a satisfactory explanation was given is in error. The fact that the agents listened to the duplicate original tapes does not mean that they might not have needed the originals later on in checking the transcriptions, or that the more detailed listening required later on in preparing transcripts might not turn up problems or malfunctions that were overlooked in the previous, more cursory listening at the end of each day. Furthermore, the district court found as a fact that there had been malfunctions in the past. The possibility of a reoccurrence is a good reason to keep the originals on hand. Nevertheless, if the government had turned over the originals and problems had developed, access to the originals should not have presented an insurmountable problem. No reason is apparent why the government could have obtained a court order to unseal the specific tapes it needed. Still, the possibility of a malfunction in one tape

and not the other is not remote and the district court found that such malfunctions had occurred.

Additionally, several other factors in the case lend support to a decision to admit the evidence. First, it is not abundantly clear that the government violated the statute. The Assistant United States Attorney in charge of the case testified that he had obtained an oral sealing order from the district judge over the phone, although he was unable to recall the exact date. A good deal of testimony was heard in an effort to establish when and if this call occurred. The district judge felt that the order was most likely given after April 25, but he did not come to any final conclusion since he found in all events that there was a satisfactory explanation for the delay. At best, the record on this point is inconclusive. As stated earlier, the defendants probably are correct in arguing that we must assume the order was obtained on May 20; however, it should at least be noted that in other cases dealing with (8)(a) the violation by the government was clear, where, in our case, the government's greatest difficulty appears to have been in its inability to prove when the order was issued.

Another important factor in this case is the length of the delay (39 days at most). In the cases discussed above which refused to suppress such evidence in this setting the delays were 13 days *(Poeta)*, 14 days *(Sklaroff)*, two weeks *(Diadone)*, 9, 26 and 38 days *(Angeline)*, 24 and 42 days *(Caruso)*, 45 days *(Falcone)*, and 57 days *(Lawson)*. By contrast, the delays in *Gigante*, which excluded the evidence, ranged from 8 months and 12 days, to 12 months and 25 days. In *Gigante*, the Second Circuit distinguished *Sklaroff* on this ground, and the Seventh Circuit has distinguished *Gigante* on this ground. *United States* v. *Angelini*, 565 F2d 469, 472 (7th Cir. 1977).

Finally, and just as important, the defendants do not allege and no evidence was presented to show that the tapes were tampered with or altered in any way. In fact, the record shows that the government was extremely careful to insure the integrity of the tapes. One F.B.I. agent, for example, testified to extra protection taken in this case:

> "As extra security on this, so that I could be satisfied today that no one had had access to that envelope once I sealed it, I insured that every one of the envelopes that had an original tape and log inside had a piece of Scotch tape over at least one of my initials on the back of each envelope. The purpose of this was that if anyone would . . . attempt to get inside the envelope, not only would they tear the envelope, . . . they [would] break the seal where my initials were and I would be able to see [that] my initials had been torn, they were in ink with the Scotch tape over at least one of the initials, I felt like there was [no] way anyone could break that seal without me seeing it because . . . the Scotch tape would have pulled the initials apart."

The added protective measure was taken at the end of each day of recording and thus was done well before the tapes were belatedly judicially sealed. This extra protection further distinguishes the case at bar from *Gigante.* In *Gigante,* the court referred to the "haphazard procedures employed in this case." 538 F2d at 505, and noted that "there were numerous irregularities. Some tapes were not given to Nalley (the special Agent in charge of the surveillance) personally, but were dropped in his mail folder. Others were not initialed, or lacked properly executed forms." *Id.* at 503, n. 1. Furthermore, as noted above, the Third, Fifth

and Seventh Circuits apparently have held that a lack of any allegation of tampering is enough to permit the wiretap evidence to be introduced at trial.

We repeat that we feel the district court's finding of a satisfactory explanation was not in error. The integrity of the tapes is not questioned, and we take into account the extra precautions taken with respect to them. Therefore, the purpose of the sealing requirement has been fulfilled, and, as discussed earlier, this fact is important in deciding whether a satisfactory explanation has been provided. The government's explanation was reasonable and accepted by the district court which heard the witnesses *ore tenus* in open court. The defendants have not shown actual prejudice in any way, and it is clear that the government did not delay the sealing in order to obtain any tactical advantage. To the extent the *Gigante* decision is contrary to the decision of the other circuits, we decline to follow it. However, we do not feel our decision necessarily conflicts with *Gigante,* for that case can best be explained by the inordinate length of the delay, the irregularities in the storage of the tapes, and the government's concession that no satisfactory explanation existed.

We admonish the government to be more careful in the future in complying with (8)(a). The facts of this case are rather unusual, and the only issue before us is whether the district court's finding of a satisfactory explanation was erroneous. This opinion should not be read as a license to disregard the sealing requirement.

III

In their third assignment of error, the defendants argue that the district judge erred by refusing to recuse himself and be called as a witness on the issue of when he gave

the oral sealing order. We do not feel the district judge was required to testify as to his judicial act in issuing the sealing order and thus was not required to recuse himself pursuant to 28 U.S.C. § 455.

The judgments of conviction are accordingly

AFFIRMED.

HALL, *Circuit Judge,* dissenting:

I respectfully dissent. I think the defendants' convictions should be reversed in light of the government's unexplained failure to immediately secure judicial sealing of its wiretap evidence, as required by 18 U.S.C. § 2518(8)(a).

The clear language of that statute requires one of three things: immediate judicial sealing of the evidence, a satisfactory explanation for its failure to do so, or suppression of the evidence at trial. Here, the evidence was not immediately sealed, and the government's purported explanation is wholly unsatisfactory. I think we are directly confronted with the difficult issue of suppression, and should give effect to Congress' intent to exclude the evidence from trial. Because its admission in this case was not harmless error, I would reverse.

The government explained its failure to seal the wiretap evidence by claiming that F.B.I. agents in charge of the surveillance needed to maintain custody of the original tapes until they ascertained that the duplicates were audible. The district court accepted this explanation and the majority thinks it is not clearly erroneous.[1] However,

[1] In most of the cases involving failure to comply with § 2518(8)(a) the government has given as its "reasonable explanation" the necessity to ascertain that duplicate tapes were audible before sealing original tapes. However, those duplicates were "duplicates" in the usual sense of the word—copies made from the originals. Here, the F.B.I. made originals and duplicate originals simultaneously, and we perceive nothing in the simultaneous recording procedure which would render the former more reliable than the latter. In *United States* v. *Angelini*, 565 F.2d 469, 472 (7th Cir. 1977), *cert. denied*, 98 S.Ct. 1487 (1978), the court noted: "The difficulty, from the Government's point of view, and the reason we consider the present case as a close one, is that there were available alternatives which might have allowed immediate sealing and yet preserved a first quality tape for clarifying the inaudible portions. The Government might have made duplicate original tapes. . . [i]n the futore, the Government, it appears to us, would be well advised . . . to use such a method. . . ."

the government's rationale is fatally undercut by the uncontradicted testimony of the F.B.I. agent in charge of the surveillance, that he and an associate had listened to the duplicate tapes almost on a daily basis during the surveillance, and that after the surveillance ended, they had listened to all of the duplicate tapes by about April 15. Thus, the government's explanation covers only the period from April 11 to April 15; yet the tapes were not judicially sealed until May 20. I think the government has failed to provide a "satisfactory explanation" for its noncompliance with the requirements of § 2518(8)(a).

Given such failure, I think the real issue in this case is whether § 2518(8)(a) requires the "Draconian remedy" of suppression. The plain language of the statute requires this result, and I think we should decline to create a judicial exception to that language, where the result dilutes a significant protection afforded by Congress to citizens under government surveillance.

Although this difficult issue is one of first impression for our court, four other circuits have analyzed the suppression question with varying results. The Third Circuit has held that, since the purpose of § 2518(8)(a) is to ensure the integrity of tape recordings after interception, violation of the sealing requirement is not sufficient for

suppression where the trial court finds that "the integrity of the tapes is pure." *United States* v. *Falcone,* 505 F.2d 478, 483-84 (3rd Cir. 1974), *cert. denied,* 95 S.Ct. 1338 (1975). The Fifth and Seventh Circuits have since agreed with this analysis. *United States* v. *Sklaroff,* 506 F.2d 837 (5th Cir. 1975);[2] *United States* v. *Lawson,* 545 F.2d 557 (7th Cir. 1975). The majority agrees with this rule requiring proof of tape tampering.

Judge Rosenn dissented in *Falcone,* and his views were later adopted by the Second Circuit in *United States* v. *Gigante,* 538 F.2d 502 (2nd Cir. 1976). Judge Rosenn argued that 'the strict sealing requirement 'directly and substantially implements the congressional intention' of maintaining the integrity of the tapes. Therefore . . . the majority is unjustified in creating an exception to the express language of § 2518(8)(a)." *United States* v. *Falcone,* 505 F.2d at 488. I agree.

The language of the statute is unambiguous and its purpose is clear. Congress intended to provide protection from potential abuses of the wiretap license, by requiring strict judicial supervision over tape recordings immediately after the period of surveillance ends. *Cf. United States* v. *Giordano,* 416 U.S. 505, 514-15, 527-28 (1974). This is an external safeguard against tampering and it

[2] *See also United States* v. *Cohen,* 530 F.2d 43 (5th Cir. 1976), *cert. denied,* 429 U.S. 855 (1977). In both *Sklaroff* and *Cohen* the analysis of the court is somewhat unclear. In both cases the court held that "proof of tampering" is a necessary element for suppression under § 2518(8)(a); however, in both cases the court appears to have accepted the government's reasons for non-compliance as "reasonable explanations." In addition, the *Sklaroff* court appears to have considered a delay of 14 days in sealing to be substantial compliance with the immediacy requirement. *United States* v. *Sklaroff,* 506 F.2d at 840-41; *United States* v. *Cohen,* 530 F.2d at 46.

is eviscerated by a rule requiring actual proof of tampering. Tampering is difficult if not impossible to prove, given the sophisticated state of the electronics art.[3] We should not cast this burden upon the defendants who have no knowledge about the recording and custody of the tapes, and we should not bog down the trial court in a time-consuming, expensive and entirely collateral "battle of the experts" on the tampering issue. The government benefitted by the terms of the statute and should live with the consequences expressly imposed by Congress for its violation.

The majority's analysis of the suppression issue by reference to § 2518(10)(a),[4] is wrong because the statute at issue here, § 2518(8)(a), contains its own suppression provision. This sidestep approach was taken by the Third Circuit, after it in effect "wrote out" the strict suppression requirement of § 2518(8)(a):

[3] "Tape recorded evidence is uniquely susceptible to manipulation and alteration. Portions of a conversation may be deleted, substituted, or rearranged. Yet, if the editing is skillful such modifications can rarely, if ever, be detected." *United States* v. *Gigante,* 538 F.2d at 505. And, as Judge Rosenn cogently noted, "[F]act finding by the district court is inherently less reliable than a strict sealing requirement." *United States* v. *Falcone,* 505 F.2d at 488 (dissenting opinion).

[4] 18 U.S.C. § 2518(10)(a) provides, in pertinent part:

Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agent, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

> . . . [the statute] provides that the 'presence of [a] seal . . . or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use . . . of any [wiretap]. . . .' By this provision Congress has provided for an alternative to the sealing requirement. It would follow from such an alternative that failure to seal the tapes promptly is not such a violation that requires suppression as a matter of law.

United States v. *Falcone,* 505 F.2d at 484.

I think this reasoning is fallacious. Where Congress has expressly provided one alternative to the immediate sealing requirement—a reasonable explanation for the delay—it does not follow that a second, unwritten alternative may be inferred.[5] Section 2518(8)(a) states that one of two express conditions *shall be a prerequisite for admission* of the evidence. Therefore, where tapes have not been immediately sealed and the government does not give a satisfactory explanation for its non-compliance, the evidence must be suppressed under the independent aegis of § 2518(8)(a) without reference to the general suppression provision.

I realize that reversal of these convictions would put to naught countless hours of investigation and preparation by the government, and voids a conviction obtained after

[5] As is apparent, I read the Third Circuit's language to mean that a showing of no tampering is a third alternative to the suppression requirement of § 2518(8)(a). The dissenting judge there read the majority's holding to this effect. However, a possible alternative reading—that the Government's explanation for non-compliance will always be deemed satisfactory where the integrity of the tapes is pure—is also illogical. Under this rationale, the government's negligence or even willful non-compliance could be excused. I think this an untenable result, totally at odds with the statute's focus on judicial supervision of the wiretap process.

a trial which lasted 2½ months and was otherwise error free. However, the statute mandates this result; and the courts have warned time and again that the procedures of § 2518(8)(a) are not mere technicalities to be ignored. *E.g., United States* v. *Falcone,* 505 F.2d at 484; *United States* v. *Lawson,* 545 F.2d at 564.[6]

This court should not be swayed by its own view as to the desirability of suppression in this instance. We deal not with the judicially created exclusionary rule, but rather with a remedy created by Congress. As Chief Justice Burger wrote in the now famous "Snail Darter Case":

> Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto. . . .
>
> [I]n our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with 'commonsense' and the public weal.'

Tennessee Valley Authority v. *Hill,* 98 S.Ct. 2279, 2302 (1978).

The court below excused the government's noncompliance partly because the government promised, in effect, to "do

[6] "[W]e again urge the government to comply with statutory wiretap requirements both pre-interception and post-interception to the fullest extent possible, rather than to continue its unenthusiastic approach for the 'technical' requirements demonstrated in this particular case."

better next time." The majority admonishes the government "to be careful in the future." Such promises and admonitions cannot substitute for statutory protections created by Congress for the benefit of citizens who have been subjected to clandestine surveillance by the government.

I respectfully dissent.

Order Denying Motion to Suppress

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

Cr. No. 77-148

UNITED STATES,

v.

JOSEPH DIANA, et al.

ORDER

This matter is before the Court upon the motion of the defendant, Joseph Diana, through his counsel, Ronald P. Fischetti, Esq., and joined in by all other defendants and counsel, to suppress wiretaps obtained pursuant to a Title III intercept order issued by this Court on March 22, 1977. The motion is two-fold and directed specifically at whether the wiretaps were sealed in accordance with 18 USC § 2518 (8)(a) and at whether an oral tap, DCSC #30, was minimized in accordance with 18 USC § 2518(5).

The motion to suppress was denied by this Court on September 23, 1977 after conducting an evidentiary hearing. Trial is scheduled to proceed on September 26, 1977. The purpose of this order is to provide the defendants a full written opinion setting forth this Court's reasons for denying the motion to suppress the wiretaps.

On March 22, 1977 this Court, under the authority of 18 USC § 2518, signed an order authorizing Special Agents of the F.B.I. to conduct electronic surveillance on four telephones in the Lancaster, South Carolina area and on oral

communications emanating from the offices of 200 South Motors and Mobile Home, Lancaster, South Carolina. The purpose of the surveillance was the revelation of the manner, if any, in which named subjects and others then unknown, participated in knowingly transporting, receiving, concealing, selling and disposing of, or causing the same, in interstate and foreign commerce, goods and merchandise, having a value in excess of $5,000, and knowing the same to be stolen, converted or taken by fraud in violation of 18 USC §§ 2314 and 2315 and which revealed the nature of any conspiracy therein. The March 22, 1977 order authorized interceptions for a twenty day period and the wiretaps were terminated on April 11, 1977. During the course of the electronic surveillance, 5-day interim reports were submitted by the government to this Court.

Some time after the wiretap terminated on April 11, 1977 and before May 20, 1977 this Court issued an oral order in accordance with § 2518(8)(a) to seal the wiretap tapes properly and deliver them to the custody of the United States Marshal's Office in Columbia, South Carolina.[1] On May 20, 1977 the tapes, contained in a sealed

[1] Contrary to the assertions of the defendants that when their first inquiry was made on September 7, 1977 in pre-trial proceedings as to whether the Court had given an oral directive to seal the tapes, that the Court had no response, this Court did explain that it had given a directive but could not specifically recall when or where it was issued and therefore would attempt to be more specific at the next pre-trial conference. Since then, the Court has had an opportunity to review its records and as yet cannot recall the specific date the directive was given but does recall that such was done in chambers in Greenville, South Carolina, by a telephonic communication to Assistant District Attorney, Thomas P. Simpson, sometime after April 11, 1977 and before May 20, 1977. More than likely, the order was given sometime after April 25, 1977, due to health problems I encountered on April 2, 1977 that necessitated my stay in the hospital until April 13, 1977 or April 14, 1977 and thereafter my infrequent visits to chambers until

envelopes and 5 sealed boxes were delivered by the government to the Marshal's Office in Columbia.

Pursuant to defendants' motion, an evidentiary showing was made on September 23, 1977. Testifying before the Court were Special Agents, Richard Oyler, Raymond Guy Nottoli and Bion Shoemaker of the F.B.I., Bennie Brake of the United States Marshal's Service and Thomas P. Simpson of the District Attorney's Office for the District of South Carolina.

This Court's findings of fact and conclusions of law relative to the motion are hereinafter set forth.

During the period of the electronic surveillance, two Special Agents of the F.B.I., Oyler and Nottoli, supervised the monitoring of the four telephones and the oral communications in the office of 200 South Motor and Mobile Homes. The phones were wiretapped, aided by a pen register, and a live mike or 'bug' was placed in the office of 200 South Motor and Mobile Homes. Oyler had previous experience conducting court authorized wiretaps. Various other agents conducted monitoring at times and were instructed by Oyler and Nottoli on conducting the electronic surveillance. Two tape recorders were assigned to each of the four telephone taps and the bug. The tow tape recorders could be simultaneously operated by flipping toggle switches. One of the two tape recorders assigned to each tap was designated original and the other duplicate original. The original tapes were to be used in court as evidence and the duplicate originals were used by the government for numerous purposes. Two logs were maintained on each tap, one labelled original and the other duplicate original.

April 25, 1977. The failure to recall the date the order was given, however, does not substantially affect the Court's decision in this matter as will be more fully discussed herein.

The logs reflected pertinent data relative to the conversations intercepted and recorded. Earphones were used to monitor the conversations and if pertinent conversations ensued, the recorders were activated. The earphones would be unused and the recorders shut off from time to time to minimize the interceptions. All monitoring agents were instructed not to listen to private and privileged conversations not pertinent to the investigation. If a call or conversation was determined to be private, monitoring ceased and a spot check would be made every 15-20 seconds thereafter to determine if the call developed into a pertinent conversation. The 'bug' was alive at all times, however, agents only monitored the bug through earphones on spot checks and if a situation arose that would lead them to believe a pertinent conversation was in progress such as after a pertinent phone conversation was intercepted in the same office or when a government informer was present. The supervising agents, Oyler and Nottoli, were in daily contact with monitoring agents as well as with the District Attorney's office and all prepared 5 day interim reports to be submitted to this Court indicating the extent of the electronic surveillance. Oyler also stated that he had often told monitoring agents to discontinue monitoring and that his review of the recorded interceptions showed minimization was effectively being accomplished. Monitoring was maintained during the hours of 7:30 A.M. to 11:30 P.M. in two shifts. At the end of a day, either Oyler or Nottoli would be present when the tapes were removed from their respective machines and Olyer was present about 80% of this time. The duplicate original tapes and logs would be maintained by the FBI for their purposes and the original tapes and logs would be maintained for the Court.

The original tapes and logs were removed at the end of each day by Special Agent Shoemaker and sealed in envelopes pursuant to instructions from Mr. Simpson. These envelopes were then placed in a locked cabinet to which only Shoemaker had access. The last intercept occurred on April 11, 1977. On April 13, 1977 Mr. Simpson called Agent Shoemaker and told him to put the sealed envelopes into 5 boxes and seal the boxes. Each box represented one of the assigned taps. On May 19, 1977, Mr. Simpson told Agent Shoemaker to deliver the boxes to the United States Marshal's office in Columbia, South Carolina. During the interim, Agent Shoemaker had kept the sealed boxes behind his desk in the FBI Office in Rock Hill, South Carolina. On May 20, 1977 after receiving instructions from Mr. Simpson, Agent Shoemaker delivered the boxes to Bennie Brake, Deputy Marshal and Supervisor in Columbia, South Carolina. The boxes were placed in the Marshal's vault and Mr. Simpson advised Mr. Brake that day that the boxes had been placed under seal by order of this Court. The boxes have remained under seal of this Court since then and have not been opened except once on September 15, 1977 before Magistrate Charles Gambrell in the defendants' and their counsel's presence.

Agent Oyler also testified that from the time the wiretap terminated on April 11, 1977 until the date the original tapes were delivered to the Marshal's office on May 20, 1977 the government retained custody of the original tapes in their sealed condition because the duplicate tapes were being used to prepare warrants, the indictment containing some 193 overt acts, many referring to intercepted communications, and transcripts and in the event a duplicate tape malfunctioned, it would be necessary to refer to the original tapes. Agent Oyler discussed holding the original

tapes for this purpose with Mr. Simpson and they agreed that it would be necessary to refer to the original in the event the duplicate malfunction. Agent Oyler was unaware of any other alternative to accomplishing this purpose. Although no malfuction occurred in this case necessitating reference to the original tapes, Agent Oyler stated he had previous experience in the past with duplicate tapes malfunctioning.

Mr. Simpson submitted an affidavit prior to the hearing that stated he had contacted this Court by telephone after the wiretap was terminated on April 11, 1977 and received an oral order to place the original tapes in suitable sealed containers and deliver them to the custody of the United States Marshal in Columbia, South Carolina. On May 20, 1977 the 5 boxes containing the original sealed tapes were delivered to Bennie Brake and Mr. Simpson advised Mr. Brake that they were under seal by order to this Court and not to be opened by anyone without an order from the Court. Mr. Brake confirmed Mr. Simpson's statement.

Mr. Simpson was called by the defendants to testify and related that he could not recall the date he received this Court's oral order but that the order was given between April 11, 1977 and May 20, 1977 and that this Court instructed him to put the original tapes under proper seal and store in the Marshal's office in Columbia. Mr. Simpson also stated that he had participated in two or three other cases wherein a written order directing sealing and custody of Title III wiretap fruits had been issued but no such written order existed in this case. The defendants also requested that this Court be a witness but the Court saw no need for such and refused the request.

SEALING

Upon the evidentiary showing, the defendants contend that the statutory requirements of 18 USC 2518(8)(a) regarding sealing have been violated and suppression of the electronic surveillance warranted in that 1) the original tapes have never been judicially sealed and 2) if the tapes have been judicially sealed, then such was accomplished 31 days after termination of the wiretap without satisfactory explanation.

The relevant provisions of 18 USC §2518(8)(a) provide that:

> "immediately upon the expiration of the period of the order . . . such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders . . . The presence of a seal provided by this subsection or a satisfactory explanation for the absence thereof shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom."

The legislative history of the statute reveals that the sealing requirement was intended to insure the integrity of the tapes after interception. The judicial sealing requirements provide that the tapes become considered as confidential court records. [1968] US Code, Cong. § Ad. News 2112, 2194.

Several courts, including the United States Supreme Court have dealt with purported post intercept procedure violations. The Supreme Court has stated that "not every failure to comply with any requirement provided in Title III would render the interception of wire and oral commu-

nications 'unlawful'." *US* v. *Chavez,* 416 US 562, 574-75 (1974); *US* v. *Donovan,* 45 U.S. LW 4115 (1-18-77). Rather, suppression is required only for a "failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device. *US* v. *Giordano,* 516 US 505, 527 (1974). In other words, the violaton must substantially impinge upon Fourth Amendment values sought to be protected by Congress in restricting and rendering uniform the use of wiretaps. *US* v. *Clerkley,* 556 F.2d 709 (4 Cir. 1977).

In view of the foregoing, the defendants' first contention that the original tapes have never been judicially sealed, must be rejected. This Court issued an oral order sometime after termination of the wiretap on April 11, 1977 and before delivery of the original tapes to the Marshal on May 20, 1977, that the tapes be properly sealed and delivered to the custody of the Marshal in Columbia, South Carolina.[2] While it might be a better practice for the issuing judge to sign a formal order directing the sealing and custody of the tapes, and to maintain a record of that proceeding, such procedures are not required by §2518(8)(a). Rather, the subsection states merely that the judge shall provide directions as to sealing and custody. *US* v. *Gigante,* 538 F.2d 502, 507 (2 Cir. 1976). Such directions were given in this case.

Neither does the statute require that sealing take place in the presence of the judge as contended by the defendants. The statute directs that the recordings be made available and sealed under the judge's direction, not in his

[2] As previously indicated, more likely such was issued after April 25, 1977.

presence. *US* v. *Abraham,* 541 F.2d 624, 628 (6 Cir. 1976). Neither does the statute describe any particular type of seal. It would hardly be more efficacious for preserving the confidentiality of the tapes to seal the tapes even moreso or put a "Judicial" seal on the tapes if it happens that the tapes have been properly sealed before such an order is issued. And as this Court has had an opportunity to inspect the tapes and their containers, it is apparent that these tapes have been properly sealed as directed by this Court.

Therefore, since it is apparent that the tapes have been sealed under directions of this Court, the Court would turn next to the defendants' contention that the tapes were not sealed immediately after the termination of the wiretap and not delivered to the custody of the Marshal as directed by this Court until 31 days[3] after the termination of the wiretap.

A review of the decision of those Courts specifically dealing with a delay in accomplishing the sealing requirements of § 2518(8)(a) makes it clear that failure to seal and deliver the tapes promptly is not such a violation that requires suppression as a matter of law since the delay, admittedly a violation of the statute, may not substantially impinge upon Fourth Amendment values sought to be protected by Congress in limiting the use of wiretaps and/or since the statute itself provides that a satisfactory explanation for the absence of a judicial seal is a sufficient prerequisite for the use of the wiretaps.

Courts have differed over whether § 2518(8)(a) provides an independent and *sole* prerequisite for admissability of the tapes and over what factors may be considered in determining whether delay in obtaining judicial sealing and

[3] April 11, 1977 to May 20, 1977 is 39 days.

custody will or will not require suppression. Compare e.g. *US* v. *Lawson,* 545 F.2d 557 (7 Cir. 1975) and *Gigante* (supra).

Lawson advocated a three step test to determine that a 57 day delay in judicially sealing tapes did not require suppression under § 2518 et seq. The three steps were:

> 1) whether the particular procedure is a central functional safeguard in Title III's scheme to prevent abuses.
>
> 2) whether the purpose which the particular procedure was designed to accomplish has been satisfied in spite of error.
>
> 3) whether the statutory requirement was deliberately ignored and if so whether there was any tactical advantage to be gained.

Under the *Lawson* rationale and other cases holding that sealing is intended to insure the integrity of the tapes after interception and not to limit use of intercept procedures, the failure here to judicially seal and deliver the tapes promptly to the custody of Marshal does not render the communications "unlawfully intercepted". See also *US* v. *Falcone,* 505 F.2d 478 (3 Cir. 1974). Cf. *Clerkley* (supra). The purpose of the statute to insure the integrity of the tapes was accomplished in this case. The testimony shows that the tapes were sealed in envelopes the day they were made and thereafter sealed in boxes. No seal was ever broken until the September 16, 1977 proceedings. There is no question that the integrity of the tapes has been preserved and no tampering of any kind has occurred. Further, there was no deliberate noncompliance and there was no tactical advantage to be gained by the government

holding the delivery of the original tapes until the duplicate tapes proved mechanically reliable to prepare warrants, indictment and transcripts of the intercepted communications. In short, there was substantial compliance with the Title III statutory requirements to warrant the use of the tapes at this trial. See also *US* v. *Cohen,* 530 F.2d 43 (5 Cir. 1975).[4] *US* v. *Sklaroff,* 506 F.2d 837 (5 Cir. 1975).

The Second Circuit would adopt somewhat different logic than the Seventh, Third and Fifth Circuits, however this Court would reach the same conclusion under the Second Circuit's *Gigante* rationale. *Gigante* would hold that despite evidence showing a lack of tampering, a delay in sealing unaccompanied by a reasonable explanation for such would render the tapes inadmissable according to the *sole* and independent provisions of § 2518(8)(a). Here, a reasonable explanation for the delay has been offered by the government in that the original tapes were necessary in the event that the duplicate tapes could not mechanically provide the needed information in preparing warrants, indictment and transcripts from April 11, 1977 to May 20, 1977. Since duplicate tapes had malfunctioned in the past, there was no reason for the government to believe it could not happen again. The mere fact that agents may have listened to the duplicate tapes during the course of the electronic surveillance would have nothing to do with a possible malfunction during the time warrants, indictment

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[4] Cohen involved a 5 week delay in sealing to prepare transcripts in the interim. The Court stated therein "Although the better procedure would have been to deliver the tapes immediately to the judge and have him release them for transcription, in view of the proof about both custody and the absence of tampering, we find no violation." Similarly, *Sklaroff* involved a 14 day delay 7 of which were for warrant preparation.

and transcripts were being prepared. Additionally, there was over 2000 hours of recorded communications intercepted and it is obvious that more detailed inspection of the tapes became necessary during the time of warrant, transcript and indictment preparation.[5] While it may have been preferable for the government to have immediately delivered the original tapes to the Court for sealing and custody and thereafter applied to this Court for the originals in the event they were needed, there is certainly no evidence that the government considered and deliberately ignored such an alternative and in fact Mr. Simpson stated that hereinafter the District Attorney's office would do just that. Therefore, in light of the testimony at the hearing and in light of the novelty of the situation in this District, this Court cannot conclude that the explanation for the delay is an unreasonable or an unsatisfactory explanation as to require suppression of the tapes at this trial.

Finally, as a collateral issue to the question of compliance with the sealing requirements of § 2518, the defendants requested that this Court become a witness and give testimony as to the issuance of its oral order requiring sealing and custody of the tapes. The defendants then indicated that if the Court became a witness they would move for its recusal from the proceedings pursuant to 28 USC § 455. The Court stated that it had issued an oral order to Mr. Simpson requiring that the tapes be properly sealed and delivered to the custody of the Marshal. The Court refused to be called as a witness and saw no reason for such. The testimony confirmed the issuance of the oral

[5] The original indictment some 41 pages in length was presented and returned by the Grand Jury on May 18, 1977 the day before Mr. Simpson ordered Agent Shoemaker to carry the original tapes to the Marshal's Office.

order and the order itself was a judicial act on the Court's part pursuant to the statute and not evidentiary in nature. The only evidentiary question before the Court was whether the order had been substantially carried out by those at whom it was directed. This Court has often given oral orders in other matters. Since the statute allows for the issuance of oral directives as to sealing and custody, see *Gigante* (supra), the defendants' position would then relate to the contention that every district judge who issued such a directive must thereafter be subject to call as a witness to give testimony as to the issuance and carrying out of that order and by so doing be subject to recusal from the proceedings. In light of the ex parte nature of Title III interceptions and the provisions of the statutes, the defendants' position is untenable. cf. *US* v. *Falcone,* 364 F.Supp. 877 (DCNJ 1973), aff'd 500 F.2d 1399 (3 Cir. 1973 table).

MINIMIZATION

The defendants next argue that the conversations intercepted via the electronic eavesdropping microphone ("bug") located in the office of "South 200 Motors" should be suppressed for failure to comply with the statute's requirement of "minimization". 18 U.S.C. § 2518(5) provides:

> Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to *minimize the interception of communications not otherwise subject to interception under this chapter* . . . (emphasis added).

At the outset it is to be noted that the statute does not require that all innocent communications be left

> untouched. Congress recognized that legitimate investigations would often uncover harmless conduct within the midst of its unlawful counterpart. Accordingly, the wiretap statute merely provides that unnecessary intrusions be minimized, or reduced to the smallest degree possible. In testing compliance with this requirement, the courts have proceeded on a case-by-case basis, invoking a standard of reasonableness. *US* v. *Clerkeley*, 556 F.2d 709 (4th Cir. 1977). *See*, Senate Report No. 1097, 1968 U.S. Code Cong. & Admin. News, at 2190.

The minization requirement is satisfied if "on the whole the agents have shown a high regard for the right of privacy and have done all they reasonably could to avoid unnecessary intrusion." *US* v. *Tartorello*, 480 F.2d 764, 784 (2nd Cir.) *cert. denied*, 423 U.S. 858 (1975).

In examining any particular case, the courts have tended to focus on three factors: (1) the nature and scope of the alleged criminal enterprise (2) the government's reasonable expectation as to the parties to the conversation and the nature thereof, and (3) the degree of judicial supervision during the execution of the wiretap order. *Clerkeley, supra*, 556 F.2d 709; *U.S.* v. *Scott*, 516 F.2d 751, *rehearing denied*, 522 F.2d 1333 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 917 (1976); *U.S.* v. *Daly*, 535 F.2d 434 (8th Cir. 1976)

Thus, as to the first factor, law enforcement officials have been given greater leeway in conducting electronic surveillance when faced with a large, well-organized criminal enterprise involving numerous parties and being carried on over a considerable area. *U.S.* v. *Quintana*, 508 F.2d 867 (7th Cir. 1975). Turning to the second factor, the government's expectation as to the nature and parties to the conversations are relevant to the extent that the

government might properly be expected to tailor its minimization efforts in advance to meet a known situation. Where law enforcement personnel are not familiar with the pattern or timing of incriminatory conversations and are not aware of the identities of all members of the criminal enterprise, less exactitude is demanded in the minimization effort. *See, U.S.* v. *James*, 494 F.2d 1007, *cert. denied*, 419 U.S. 1020 (1974); *US* v. *Quintana*, 508 F.2d 867, at 874 (7th Cir. 1975).

The last factor considered is the extent of judicial supervision during the execution of the wiretap order. 18 U.S.C. § 2518(6) provides that:

> Whenever an order authorizing interceptions is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

Since judicial scrutiny "enhances the protection of individual rights . . ." *U.S.* v. *Bynum*, 360 F.Supp. 400, at 410 (S.D.N.Y. 1973), courts have been more inclined to find good faith minimization where such reports have been required and reviewed at regular intervals. *U.S.* v. *Daly*, 535 F.2d 434 (8 Cir. 1976); *Clerkeley, supra*, 556 F.2d 709.

In the instant situation, the FBI agents conducting the surveillance were faced with just such a large far-flung enterprise, involving allegedly stolen automobiles being "stripped" in New York with their parts being transported along the eastern seaboard to numerous receivers throughout the state of South Carolina, who in turn allegedly sold the items to ultimate consumers. The affidavit in support

of the wiretap named at least eight persons, scattered throughout New York, North Carolina, and South Carolina, thought by the FBI to be involved in the enterprise, along with others whose "identification . . . is yet unknown." The "nature and extent of the illegal business" was not fully known, nor was the "degree of involvement" of others.

> Large . . . conspiracies may justify considerably more interception than would a single criminal episode. This is especially so where, as here, the judicially approved purpose of the wiretap is not so much to incriminate the known person whose phone is tapped as to learn the identity of the far-flung conspirators and to delineate the contours of the conspiracy. *U.S.* v. *Quintana,* 508 F.2d 867 (1975).

Additionally, the supervisory agent in charge of the wiretap operation (agent Oyler, an agent with fourteen years experience with the FBI and prior experience with several other wiretap operations) was furnished with a copy of the Court's order authorizing the surveillance. He testified that before commencing the wiretap operation, he met with the assistant United States Attorney in charge of the case and had numerous conversations with him, wherein he received instructions in regards to minimization of the interceptions. In Oyler's words, he was told by Simpson to be "extremely careful" not to intercept any personal calls. Thereafter, Oyler and Special Agent Nottoli met with the twelve to fifteen other agents who were to be assigned to monitor the conversations. These agents were instructed to "spot check" for criminal conversations and not to record personal calls. Inasmuch as agents Oyler and Nottoli were more familiar with the facts of the case than anyone else (agent Oyler having been involved for some two years, and agent Nottoli for two-and-a-half to three

years), the monitoring agents would occasionally ask them to listen in to the conversations to help determine the pertinence of the calls.

Furthermore, Oyler testified that at the end of each day he reviewed the tape "logs" and listened to the duplicate tapes and was able to determine that his monitoring agents were following their instructions in regard to minimization.

Also significant is the fact that aural transmissions from the "bug" were received on a set of earphones, which were not always worn. Using the same procedure employed with the phone calls, agents would occasionally pick up the earphones and "spot check" the conversations in the office, generally after telephone calls had been concluded.

Finally, as indicated hereinbefore, agent Oyler made daily reports to the Assistant United States Attorney in charge of the case, and five-day written reports were submitted to him which were in turn forwarded to this Court and reviewed.

Under the circumstances shown, this Court is satisfied that the government has made a *prima facie* showing of reasonable minimization; accordingly, the burden thus shifts to the defendants to show that alternative procedures for minimization would have allowed the government to attain its objectives. This the defendants have not done.

Accordingly,

It Is Ordered that the motion to suppress the evidence obtained by electronic surveillance be and the same is hereby denied. Let copies of this order be given to the parties.

.....

United States District Judge

Columbia, S. C.

September 28, 1977

Order Denying Rehearing

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 78-5053

UNITED STATES OF AMERICA,

Appellee,

versus

JOSEPH DIANA, BILLY JOE ROBERTSON, et al.,

Appellants,

and

ANTHONY MILIA, et al.,

Defendants.

No. 78-5054

UNITED STATES OF AMERICA,

Appellee,

versus

DAVID DONNELL WHITE,

Appellant.

ORDER

Upon consideration of the appellants' petition for rehearing, by counsel,

IT IS ORDERED that the petition for rehearing is DENIED.

A request for a poll on the suggestion for rehearing en banc was made, but the poll failed for lack of majority support.

Order Denying Rehearing

Entered at the direction of Judge Hall for a panel consisting of Judge Field, Judge Widener, and Judge Hall.

For the Court,

/s/ WILLIAM K. SLATE, II
Clerk

FILED
OCT 23 1979
U. S. Court of Appeals
Fourth Circuit